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**(2003) 05 MP CK 0065**

**In the Madhya Pradesh High Court**

**Case No :** Letters Patent Appeal No's. 366 and 367 of 2001

Kirloskar Brothers Ltd.

APPELLANT

Vs

Appellate Authority under Payment of Gratuity Act and Others

RESPONDENT

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**Date of Decision :** 08-05-2003

**Acts Referred:**

Payment of Gratuity Act, 1972 — Section 2  
Employees State Insurance Act, 1948 — Section 2(22)

**Citation :** (2003) 3 LLJ 1035 : (2003) 4 MPHT 304

**Hon'ble Judges :** S.K. Seth, J;Deepak Verma, J

**Bench :** Division Bench

**Advocate :** G.M. Chaphekar and Patwardhan, for the Appellant; P.K. Saxena Kuldeep Bhargava and Rauka for Respondent Nos. 3 to 26, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

1. The delay of 7 days has already been condoned by this Court in L.P.A. No. 366 of 2001 on 8-8-2002. For the same reasons, the delay of 7 days is also condoned in L.P.A. No. 367 of 2001. The M (C) filed by appellant for condonation of delay stands disposed of.

2. Since common question of law and fact are involved in both the appeals, they were heard analogously and are being disposed of by this common order.

3. Respondents/employees of the appellant Company had sought voluntary retirement. They were paid their retiral benefits. However, they were not satisfied with the same on the ground that while calculating the payment of gratuity the amount of incentive bonus said to have been earned by them, was not included. All the employees, 24 in number, moved separate applications before the Competent Authority appointed under the Payment of Gratuity Act, 1972 (for short "the Act") for payment of incentive bonus or production bonus to them.

4. On being noticed by the Competent Authority, the appellant herein appeared

and opposed the prayer of the employees mainly on the ground that incentive bonus can not be included in "Wages" as defined u/s 2(s) of the Act, thus the employees would not be entitled to receive the same. The appellant also raised further plea of limitation that the applications have been filed much after the expiry of period of limitation. On these two preliminary grounds the contention was that the applications filed by the employees deserve dismissal. The Competent Authority, vide its order dated 31-8-95 rejected the applications of the employees, upholding the objections of the appellant. It held that the applications were barred by limitation and payment of incentive bonus could not have been included and called part of the wages.

5. Being dissatisfied with the order passed by the Competent Authority all the employees herein preferred individual appeals to the Appellate Authority. The Appellate Authority after considering the matter, allowed the appeals and set aside the order of the Competent Authority dated 31-8-95. The Appellate Authority not only condoned the delay but also held that incentive bonus is very much part of wages, hence it is to be included while calculating payment of gratuity. As a necessary consequence there of the appellant/employer was directed to recalculate the amount of gratuity including the amount of incentive bonus in the wages paid to each of the employee and then to pay the difference amount.

6. The appellant being aggrieved by the said appellate order preferred a writ petition under Article 226/227 of the Constitution of India, before the learned Single Judge. Learned Single Judge dismissed the petition on 25-6-2001 holding therein that incentive bonus would be included in the "Wages" as defined u/s 2(s) of the Act, and therefore, was payable by the appellant to its employees. Learned single Judge has placed reliance on a judgment of the Supreme Court *Harihar Polyfibres Vs. Regional Director, ESI Corporation*, . Even though the learned Single Judge has recorded a finding that the said judgment of the Supreme Court in *M/s. Harihar Polyfibres (supra)* was dealing with the wages as defined under the employees State Insurance Act, consequently, it held that incentive bonus is part of the wages. It was further held that though there existed some difference in the definitions of "wages" u/s 2(22) of the State Insurance Act and that of Section 2(s) of the Act, with which we are concerned, but held that the difference is not of such a magnitude which would disentitle the respondent employees to claim incentive bonus being part of the wages.

7. To understand the question whether the definition of "Wages" as found in Section 2(22) of the ESI Act can be made applicable to the facts of the present case, it is necessary to reproduce the same hereinabove :--

"(22) "wages" means all remuneration paid or payable in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lockout, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not

include-

- (a) any contribution paid by the employer to any pension fund or provident fund, or under this Act;
- (b) any travelling allowance or the value of any travelling concession;
- (c) any sum paid to the person employed to defray special expenses entailed on him by nature of his employment; or
- (d) any gratuity payable on discharge."

8. After going through the aforesaid judgment of the Supreme Court in *M/s. Harihar Polyfibres (supra)*, it is clear that the Court was dealing with the definition of "wages" as found in the ESI Act. However, in the present case we are concerned with the definition of "wages" as defined in Section 2(s) of the Act, which is reproduced hereinbelow :--

"(s) "Wages" means all emoluments which are earned by an employee while on duty or leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance."

9. After the order was passed by the learned Single Judge on 25-6-2001, Supreme Court had the occasion to consider an identical matter and the judgment was pronounced by the S.C. on 24-8-2001 reported in *T.I. Cycles of India, Ambattur Vs. M.K. Gurumani and Others*, In the said case the Supreme Court considered all other previous cases which had dealt with the definition of "wages" as appearing in different Acts. In this case the Supreme Court was specifically considering the "wages" as defined under the said Act. After considering the matter, the Supreme Court has recorded a finding that incentive bonus or production bonus would not be included in the wages. Supreme Court also considered its earlier judgment *R.S. Saini Vs. State of Punjab and Others*, . The ratio of the said case has been discussed in Para 12 of the said judgment, which is reproduced hereinbelow :--

"The test adopted in that case is that in order to be excluded from "basic wages" the payment under such a scheme must have a direct nexus and linkage with the amount of extra output. On an examination of the scheme in that case, it was found that less than normal number of workmen doing normal work of a shift, production bonus was given according to the deficiency in the numerical strength of workmen and extra output given by any workman in any shift, output of different types of workmen being measured according to the prescribed norms but production bonus not directly linked with the amount of the extra output furnished by the workman concerned but paid at a uniform rate of his normal wages was held to be not bonus at all and the scheme was not a genuine one. It was not the same as incentive bonus scheme."

10. In the aforesaid case it may be mentioned that the respondents/employees had filed the application before the Competent Authority mentioning therein that they were entitled for payment of incentive bonus without giving any further details with regard to any extra work said to have been done by them while they were in the employment. No other necessary particulars were furnished by the employees in the said application except for the years of service that was put in by them. Thus the ratio of Daily Pratap (supra) would not apply to the facts of the present case. The initial burden certainly lay on the employee to prove that he had worked for extra time and the output was more than the contracted one. Not having done so the employees can not be held entitled to claim incentive bonus or production bonus.

11. Apart from the above the definition of "Wages" as appearing in the aforesaid case makes it clear that it shall not include any bonus, commission, house rent allowance, overtime wages and any other allowance. The definition does not leave any amount of doubt in our mind that incentive bonus/production bonus, in any case could not have been included in the wage structure.

12. In view of the aforesaid discussion we are of the considered opinion that the learned Single Judge has committed an error in including incentive bonus/production bonus in the structure of wages of the employees. In fact, it specifically excluded any such bonus. The judgment of the Supreme Court in M/s. Harihar Polyfibres (supra) on which reliance was placed by learned Single Judge was certainly misplaced. In M/s. Harihar Polyfibres (supra), as has been mentioned by us above, the Supreme Court was dealing with the definition of wages as appearing in ESI Act which could not have been made applicable to the present cases as the definition of wages is entirely different from the definition of wages as appearing in the ESI Act. Comparison of the two definitions of wages in two different Acts and yet giving benefit to the respondents employees of the "wages" as defined in the other Act, in the present case, was certainly misconceived.

13. Not only this but now the question has been set at rest by the recent judgment of the Supreme Court in the matter of T.I. Cycles (supra). Nothing more is required to be said in view of the ratio of the Supreme Court in the aforesaid judgment. Thus in our considered opinion the impugned order passed by learned Single Judge can not be upheld. The same deserves to be quashed. It is, accordingly hereby set aside and it is held that the respondents/employees would not be entitled to claim incentive bonus/production bonus to be included in the wages.

14. In this view of the matter all the impugned orders which have been passed by the Competent Authority/Appellate Authority in favour of the employees and against the employer, also stand hereby quashed. The appeals, therefore, stand allowed with no order as to costs.